

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DONALD J. SANDERS,
MARK C. JACOBS, LISETTE M. CURTIN,
KEITH G. BELLIN, ROB D. EVERETT
and LEE P. GARVEY

Appeal No. 96-3347
Application 08/160,460¹

ON BRIEF

Before FRANKFORT, PATE and NASE, **Administrative Patent Judges**.

PATE, **Administrative Patent Judge**.

DECISION ON APPEAL

¹ Application for patent filed December 1, 1993. According to appellants, this application is a continuation of Application 07/978,576, filed November 19, 1992.

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This is an appeal from the final rejection of claims 1, 2, 4 through 8, 10 through 15, 18, 19 and 21 through 28. These are the only claims remaining in the application.

The claimed invention is directed to an apparatus for enveloping the absorbent core of a disposable diaper or the like. For a further understanding of the claimed subject matter, reference is made to appealed claim 1, a copy of which is appended to the appeal brief.

The references of record relied upon as evidence of obviousness are:

Teed ('272)	3,984,272	Oct. 5, 1976
Goodbar	4,259,958	Apr. 7, 1981
Teed ('782)	4,261,782	Apr. 14, 1981

THE REJECTIONS

The following rejections are before us on appeal. Claims 1, 2, 4 through 8, 10 through 15, 18, 19 and 21 through 28 stand rejected under 35 U.S.C. § 103 as unpatentable over Goodbar in view of Teed ('272).

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Claims 12 through 14, 23 and 24 stand rejected under 35 U.S.C. § 103 as unpatentable over Goodbar in view of Teed ('272) and further in view of Teed ('782).

OPINION

We have carefully reviewed the rejections on appeal in light of the arguments of the appellants and the examiner. As a result of this review, we have reached the conclusion that the applied prior art does not establish a ***prima facie*** case of obviousness with respect to the subject matter on appeal. Accordingly, the rejections on appeal are reversed. Our reasons follow.

Appellants argue correctly that neither of the cited references of Goodbar and Teed ('272) discloses or contemplates the use of superabsorbent materials. We note further that the examiner on page 4 of the examiner's answer states that superabsorbent materials are well-known and it would have been within the purview of those having ordinary skill to use such in the diaper of Goodbar as modified by Teed. However, by the examiner's failure to include any

evidence regarding super- absorbent materials, at least the applied prior art cannot provide evidence of the recognition in the art of the problem of superabsorbent material migration. We note that the recognition of the problem is part of the subject matter as a whole which should always be considered in determining the obviousness of an invention under 35 U.S.C. § 103. ***In re Sponnoble***, 405 F.2d 578, 585, 160 USPQ 237, 243 (CCPA 1969).

Secondly, means-plus-function language in a claim must be construed by looking to the specification and interpreting the language of the claim in light of the corresponding structure, materials, or acts described in the specification. ***See In re Donaldson Co., Inc.***, 16 F.3d 1189, 1193, 29 USPQ2d 1845, 1848 (Fed. Cir. 1994). Therefore, it is clear that the sealing means as claimed in claim 1, which is disclosed in the specification as an adhesive or heat sealing means must be interpreted as such when construing claim 1. Therefore, it was incumbent on the examiner to make a factual finding that the embossing means disclosed by Teed ('272) is the same as or

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an equivalent of the heat sealing or adhesive means claimed in claim 1. The examiner has made no such finding of either structural similarity or equivalency. Therefore, the examiner has not sustained his burden of presenting a *prima facie* case of obviousness.

Thirdly, we note the examiner's argument that although the spacing between the adhesive strips **21** of Teed 1272 is not a fully closed pattern, it would have been obvious to substitute a single transverse adhesive strip for the strips **21**. See page 4, examiner's answer. We note that there is absolutely no teaching for this change or substitution of the adhesive configuration in Teed or in Goodbar as modified by Teed. An obviousness rejection must be based on evidence. Where it is not based on evidence, it cannot stand. See *In re GPAC*, 57 F.3d 1573, 1582, 35 USPQ2d 1116, 1123 (Fed. Cir. 1995). For these reasons, the rejections of all claims on appeal is reversed.

REVERSED

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CHARLES E. FRANKFORT)	
Administrative Patent Judge)	
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WILLIAM F. PATE, III)	BOARD OF PATENT
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